

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SUPERIOR ENERGY SERVICES, LLC,

Petitioner,

No. C 13-2056 PJH

v.

**ORDER DENYING FIRST AMENDED
PETITION TO COMPEL
ARBITRATION**

CABINDA GULF OIL COMPANY LTD.,

Respondent.

This matter came on for hearing on December 4, 2013. Petitioner Superior Energy Services, LLC and respondent Cabinda Gulf Oil Company Limited appeared by counsel. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby DENIES the first amended petition to compel arbitration.

BACKGROUND

According to the allegations of the first amended petition for an order compelling arbitration ("Am. Pet."), filed by petitioner Superior Energy Services, LLC ("Superior Energy" or "SES"), respondent Cabinda Gulf Oil Company Limited ("CABGOC") conducts oil and gas exploration and development operations off the coast of Angola. Prior to May 2009, CABGOC contacted Superior Energy about providing CABGOC with ships, scuba diving and other equipment and personnel to support its oil and gas operations. In order to comply with Angolan law, Superior Energy associated with an Angolan company, Operatec Maquinas e Representacoes Limitada ("Operatec"), and arranged for Operatec to contract with CABGOC to provide the necessary services, and then enter a subcontract with Superior Energy to perform the actual work. Am. Pet. ¶ 5.

A. The Main Contract

On May 1, 2009, Operatec entered a contract with CABGOC for Operatec (as "CONTRACTOR") to provide scuba diving services, ships, personnel and equipment to CABGOC (as "COMPANY") for its oil and gas operations off the coast of Angola. Am. Pet. ¶ 6 and Ex. A (the "Main Contract"). The Main Contract states that its terms shall apply to any subcontractor's Work:

13. BUSINESS RELATIONSHIP OF THE PARTIES

This is a Contract for Services and shall not be construed as a charter or lease of CONTRACTOR's equipment. All of CONTRACTOR's Operations are those of an independent contractor, and CONTRACTOR, its employees, agents and representatives are not employees or agents of COMPANY. As an independent contractor, CONTRACTOR assumes all legal and contractual obligations arising out the performance of the Work, no matter to whom such obligations may be owing, whether to the Country or any political subdivision thereof, to CONTRACTOR's own personnel or to third persons. Use of subcontractors by CONTRACTOR shall not relieve CONTRACTOR from any liability or obligation under this Contract. The terms of this Contract regarding CONTRACTOR's Work to be performed, its equipment and personnel shall likewise apply to any subcontractor's Work to be performed, its property and personnel as if such Work, property and personnel were the Work, property and personnel of CONTRACTOR. COMPANY may instruct and direct CONTRACTOR as to the results to be obtained from CONTRACTOR's employees. CONTRACTOR, as an independent contractor, however, shall have complete control, supervision and direction over its equipment and personnel and over the manner and method of all its Operations.

Main Contract, Art. 13. The Main Contract between CABGOC and Operatec also includes an arbitration provision:

18. APPLICABLE LAW AND SETTLEMENT OF DISPUTES

This Contract, including this Article 18, shall be governed, construed, interpreted, enforced and the relationship of the parties determined in accordance with the laws of California, U.S.A., without regard to its choice of law rules.

18.1 Any dispute, controversy or claim arising out of, in relation to, or in connection with this Contract or the operation/activities carried out under this Contract, including without limitation any dispute as to the existence, construction, validity, interpretation, enforceability or breach of this Contract (hereafter "Dispute") shall be exclusively and finally settled as set forth hereafter.

Main Contract, Art. 18. The Main Contract also contains a non-assignment provision:

1 **16. ASSIGNMENT**

2 . . .

3 16.2 CONTRACTOR [Operatec] may not assign any of its
4 rights or obligations under this Contract without the prior
5 written consent of COMPANY. Any government
6 approvals required therefor shall be the sole
7 responsibility of CONTRACTOR.

8 Main Contract, Art. 16.

9 **B. The Subcontract**

10 Also on May 1, 2009, Operatec entered into a subcontract agreement with Superior
11 Energy, whereby Superior Energy (as Subcontractor) agreed to perform the services as
12 defined in the Main Contract, on behalf of Operatec (as Contractor) upon the terms and
13 conditions set forth in the subcontract. Am. Pet. ¶ 9 and Ex. B (the "Subcontract"). The
14 Subcontract provides as follows:

15 **WHEREAS**, Contractor entered into [the Main Contract] dated 1 May
16 2009 between it, as the main contractor, and Cabinda Gulf Oil Company
17 Limited ("*Company*"); and

18 **WHEREAS**, the Main Contract pertains to the supply of diving
19 services for the performance of certain services associated with Company's
20 offshore exploration or production activities all as more fully described in the
21 Main Contract; and

22 **WHEREAS**, Subcontractor has agreed to perform the Services
23 (defined below) on behalf of Contractor upon the terms and conditions
24 herein set forth; . . .

25 **1. The Services**

26 1.1 The Subcontractor shall perform the "*Services*" as defined in,
27 and to be performed by Contractor under, the Main Contract (the
28 "*Services*"). . . .

1 1.2 Subcontractor agrees to be bound by all the terms and
2 conditions of the Subcontract and the Main Contract as it relates to the
3 Services and assumes all of the obligations of Contractor to Company as
4 set forth in those terms of the Main Contract in relation to the performance
5 of the Services. Likewise, Contractor agrees to extend to Subcontractor all
6 rights and benefits under the Main Contract which are extended to
7 Subcontractor by Company in relation to the performance of the Services.
8 The Main Contract is attached hereto in Appendix A and made a part
9 hereof.

10 1.3 This Subcontract and the Main Contract are intended to
11 supplement and complement each other and shall, where possible, be

thusly interpreted. If, however, any provision of this Subcontract conflicts with any provision of the Main Contract, the terms of the Subcontract shall govern the relationship between Contractor and Subcontractor. The Services shall be governed by the Main Contract.

Subcontract at 1. Superior Energy directly provided the Work and Services to CABGOC, and CABGOC worked with Superior Energy personnel on a daily basis in connection with CABGOC's offshore oil and gas exploration and development activities. Am. Pet. ¶ 10.

C. Amendment No. 2 to Main Contract

On March 20, 2011, CABGOC and Operatec entered into Amendment No. 2 to the Main Contract, providing for the work performed by the subsea operations vessel (SOV) Ullswater in making certain subsea repairs and related support services. Am. Pet., Ex. F ("Amendment No. 2"). The Ullswater is owned by a subsidiary of Superior Energy, Hallin Marine, LLC. Am. Pet. ¶ 11, n.1. From about April to July 2011, Superior Energy provided the Ullswater and the equipment and personnel to support the Ullswater subsea repair activities as described in Amendment No. 2. Am. Pet. ¶ 11.

D. Nonpayment Dispute

Superior Energy alleges that it issued a number invoices through Operatec to CABGOC for the use of the Ullswater and related equipment and personnel. CABGOC agreed to pay some, but not all, of the invoices. Superior Energy then reissued the charges as two separate invoices to separate the undisputed charges from the disputed charges which totaled \$2,028,574 (the "Ullswater Disputed Invoice"). Am. Pet. ¶ 12.

E. Superior Energy's Settlement with Operatec

Superior Energy and Operatec mediated their disputes arising out of the Subcontract and entered a settlement agreement on January 15, 2013, whereby Superior Energy released Operatec from all claims associated with the Ullswater Disputed Invoice and reserved its rights as against CABGOC for payment of the Ullswater Disputed Invoice:

The Ullswater Claims. SES [Superior Energy Services, LLC] agrees to release Operatec and Ray from and against all claims, disputes and liabilities arising out of, relating to or in connection with those claims associated with SES invoices submitted to CABGOC in connection with the Ullswater Disputed Invoices; however, Operatec

acknowledges that SES reserves its rights as against CABGOC for payment of the Ullswater Disputed Invoices. The scope of this release shall not inure to the benefit of CABGOC, and SES reserves all rights to pursue payment from CABGOC and any other appropriate party not released hereby. . . .

Am. Pet., Ex. G at 3 (the "Settlement Agreement").

The parties entered a supplement to the settlement agreement on May 24, 2013, which included a provision that "the Settlement Agreement provides that SES, and not Operatec, has the right to pursue any and all claims for recovery of any allegedly unpaid sums for the Work or Services supplied by SES, as reflected in the Ullswater Disputed Invoices." Am. Pet., Ex. G ¶ 2 (the "Supplement to Settlement"). The Supplement to Settlement further provides that the settlement agreement was not intended to constitute an assignment in violation of nonassignment provision of Article 16.2 of the Main Contract. Am. Pet., Ex. G ¶ 6.

F. Demand for Arbitration

By letter dated March 6, 2013, Superior Energy suggested that CABGOC mediate the payment for services covered by the Ullswater Disputed Invoice, and if mediation was unsuccessful, to arbitrate the dispute. Am. Pet., Ex. C. CABGOC refused to mediate and indicated that it would reject any notice of arbitration. Am. Pet., Ex. D.

On April 26, 2013, Superior Energy filed a demand for arbitration before the American Arbitration Association for nonpayment and breach of the Main Contract and Amendment No. 2. Am. Pet., Ex. E.

On June 7, 2013, Superior Energy filed the instant petition for an order to compel arbitration. Superior Energy and CABGOC have agreed to stay the arbitration pending the court's ruling on the petition. Am. Pet. at 7 n.2. Pursuant to the stipulations of the parties, the court issued briefing schedules on the first amended petition, and the operative petition is fully briefed. In support of its reply, Superior Energy submitted declarations attesting to the factual allegations made in the first amended petition. The court declines to consider these declarations on the ground that they were improperly raised in reply, even after CABGOC stipulated to the filing of an amended petition, affording CABGOC no opportunity

to respond to the statements made therein. The evidentiary objections raised by CABGOC are overruled as moot.

LEGAL STANDARD

Section 2 of the Federal Arbitration Act (FAA) provides that a written arbitration agreement in “a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable.” 9 U.S.C. § 2. Any party bound to an arbitration agreement that falls within the scope of the FAA may bring a motion in federal district court to compel arbitration and dismiss or stay the proceedings. 9 U.S.C. §§ 3, 4. The FAA eliminates district court discretion and requires the court to compel arbitration of issues covered by the arbitration agreement. *Dean Witter Reynolds, Inc., v. Byrd*, 470 U.S. 213, 218 (1985). The role of the federal courts in these circumstances is limited to determining whether the arbitration clause at issue is valid and enforceable under § 2 of the FAA. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). That is, the court must determine whether there is an agreement between the parties to arbitrate; the claims at issue fall within the scope of the agreement; and the agreement is valid and enforceable. *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004).

An arbitration agreement governed by the FAA is presumed to be valid and enforceable. See *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226–227 (1987). The party resisting arbitration bears the burden of showing that the arbitration agreement is invalid or does not encompass the claims at issue. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000). Because of the strong federal policy favoring arbitration, doubts or ambiguities must be resolved in favor of and not against arbitration. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (citing *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983)).

The right to compel arbitration stems from a contractual right, and that contractual right may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration. *Britton v. Co-op Banking Grp.*, 4 F.3d 742, 744 (9th Cir. 1993) (citing *Lorber Industries of California v. Los Angeles Printworks*

Corp., 803 F.2d 523, 525 (9th Cir. 1986)). An entity that is neither a party to nor agent for nor beneficiary of the contract lacks standing to compel arbitration. *Id.* (citing *E.E.O.C. v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543, n. 2 (9th Cir. 1987)). Nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles. *Britton*, 4 F.3d at 745 (citing *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986)).

DISCUSSION

A. The Written Agreements Do Not Assign Operatec's Rights to Superior Energy.

This dispute involves two separate contracts for providing subsea operations vessel and other services in support of CABGOC's offshore oil exploration and development efforts in Angola:

(1) the Main Contract between CABGOC and Operatec; and

(2) the Subcontract between Operatec and Superior Energy.

It is undisputed that under Article 18 of the Main Contract, CABGOC agreed to arbitrate any disputes arising out of the contract with Operatec. It is further undisputed that Superior Energy was not a party to the Main Contract. The contractual issues in dispute are whether CABGOC and Operatec expressly assigned the rights and benefits under the Main Contract to Superior Energy pursuant to Section 13 of the Main Contract and Sections 1.2 and 1.3 of the Subcontract, and whether Operatec assigned to Superior its causes of action against CABGOC to pursue payment for services billed in the Ullswater Disputed Invoice.

1. Legal Standard

"The burden of proving an assignment falls upon the party asserting rights thereunder." *Heritage Pac. Fin., LLC v. Monroy*, 215 Cal. App. 4th 972, 988-89 (2013) (quoting *Cockerell v. Title Ins. & Trust Co.*, 42 Cal. 2d 284, 292 (1954)), *rev. denied* July 31, 2013. "An assignment agreement 'must describe the subject matter of the assignment with sufficient particularity to identify the rights assigned.'" *Id.* (quoting *Mission Valley East, Inc. v. County of Kern*, 120 Cal. App. 3d 89, 97 (1981)). "As with contracts generally, the nature of an assignment is determined by ascertaining the intent of the parties." *Id.*

1 In determining whether an assignment has been made, the intention of the parties
2 as manifested in the instrument is controlling. *California Ins. Guarantee Assn. v. Workers'*
3 *Comp. Appeals Bd.*, 203 Cal. App. 4th 1328, 1335 (2012) (citations and internal quotation
4 marks omitted). "An assignment of a right is a manifestation of the assignor's intention to
5 transfer it by virtue of which the assignor's right to performance by the obligor is
6 extinguished in whole or in part and the assignee acquires a right to such performance."
7 *Id.* at 1337 (quoting Rest. 2d Contracts (1981) § 317(1)).

8 **2. Main Contract**

9 Superior Energy contends that CABGOC and Operatec assigned the rights and
10 responsibilities under the Main Contract to Superior Energy, citing Article 13 of the Main
11 Contract which provides that its terms "regarding [Operatec's] Work to be performed, its
12 equipment and personnel shall likewise apply to any subcontractor's work to be performed,
13 its property and personnel as if such Work, property and personnel were the Work,
14 property and personnel of [Operatec]."

15 The provision of the Main Contract cited by Superior Energy does not evidence an
16 intent to transfer Operatec's rights to Superior Energy. Article 13 requires that the terms of
17 the Main Contract regarding Operatec's work to be performed under the contract must also
18 apply to any subcontractor's work, thereby requiring the scope of work performed by a
19 subcontractor to be consistent with the scope of work defined in the Main Contract.
20 Superior Energy contends that this provision amounts to express assignment of the rights
21 and obligations under the Main Contract to Superior Energy, but cites no provision in the
22 Main Contract where Operatec purports to assign its rights to Superior Energy, so as to
23 extinguish its own right to performance and its obligations under the contract. As Article 13
24 states, "Use of subcontractors by [Operatec] shall not relieve [Operatec] from any liability or
25 obligation under the Contract."

26 **3. Subcontract**

27 Superior Energy contends that the Subcontract contains an express assignment by
28 Operatec of its rights under the Main Contract to Superior Energy. Mot. at 11. Section 1.2

of the Subcontract provides that Superior Energy “assumes all of the obligations of Contractor [Operatec] to Company [Superior Energy] as set forth in those terms of the Main Contract in relation to the performance of the Services.” Section 1.2 further provides, “Likewise, Contractor agrees to extend to Subcontractor all rights and benefits under the Main Contract which are extended to Subcontractor by Company in relation to the performance of the Services.” Sections 1.2 and 1.3 express the parties’ agreement that Superior Energy would perform the services to be performed by Operatec under the Main Contract, as reflected in Section 1.1 (“Subcontractor shall perform the “Services” as defined in, and to be performed by Contractor under, the Main Contract”), and that Superior Energy would be bound by the scope of work defined by the Main Contract “in relation to the performance of the Services.” Although these particular terms contain language, standing alone, that would support Superior Energy’s argument that Operatec assigned its rights and obligations under the Main Contract to Superior Energy, when taken in the context of the entire agreement, these provisions of the Subcontract do not effect an assignment of the Main Contract by Operatec to Superior Energy. See *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 473 (1998) (“Any contract must be construed as a whole, with the various individual provisions interpreted together so as to give effect to all, if reasonably possible or practicable.”) (citing Cal. Civ. Code § 1641; Cal. Code Civ. Proc. § 1858; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts § 686 at 619-20.)

a. Payment Under Main Contract Remained Payable to Operatec, Not Superior Energy

Section 2 of the Subcontract, which governs Operatec’s obligation to pay Superior Energy for full performance of the services defined in the Main Contract, does not indicate that Superior Energy was assigned Operatec’s right to payment under the Main Contract. Rather, the Subcontract recognized that the amounts due under the Main Contract remained payable to Operatec: “Contractor [Operatec] shall pay Subcontract [Superior

1 Energy] all amounts **due and payable to Contractor** under the Main Contract.”

2 Subcontract § 2 (emphasis added).

3 Accordingly, Section 3 of the Subcontract provides that CABGOC’s payments under
4 the Main Contract would be deposited into an Angolan bank account held by Operatec, and
5 that Operatec would transfer the Main Contract payments to an offshore account
6 established by Superior Energy. These provisions governing payment obligations and
7 procedures show that Operatec did not assign to Superior Energy the right to payment from
8 CABGOC under the Main Contract, but show that the parties intended that Superior Energy
9 would receive payment from Operatec under the terms set forth in the Subcontract.

10 **b. Consent to Assignment Provision of Subcontract**

11 Section 4.4 of the Subcontract expressly prohibits Operatec from assigning its rights
12 and obligations under the Main Contract without Superior Energy’s consent. This provision
13 is inconsistent with an assignment by Operatec of all its rights under the Main Contract to
14 Superior Energy. That is, the following consent-to-assignment provision in the Subcontract
15 would not be necessary if the rights under the Main Contract had been assigned to
16 Superior Energy:

17 4.4 Contractor shall not assign, transfer, encumber, pledge or otherwise
18 dispose of the Main Contract, in whole or in part, or any of its rights and
obligations thereunder without the prior written consent of Subcontractor.

19 Read in the context of this consent-to-assignment provision, Sections 1.2 and 1.3 do not
20 demonstrate an intent to assign or transfer Operatec’s rights under the Main Contract to
21 Superior Energy. *See City of Atascadero*, 68 Cal. App. 4th at 473 (“Courts must interpret
22 contractual language in a manner which gives force and effect to every provision, and not
23 in a way which renders some clauses nugatory, inoperative or meaningless.”) (citations
24 omitted).

25 CABGOC refers to section 1.2 as a “pass-through” provision, Opp. at 11, and neither
26 party addresses or disputes the issue whether the Subcontract included a pass-through
27 agreement. *See Sehulster Tunnels/Pre-Con v. T aylor Bros., Inc./Obayashi Corp.*, 111 Cal.
28 App. 4th 1328, 1348-49 (2003) (when an owner’s breach of a construction contract with a

1 general contractor results in damage to a subcontractor who lacks standing to assert a
 2 claim directly against the owner, “a general contractor is permitted to present a
 3 pass-through claim on behalf of the subcontractor against the [owner]”) (citations omitted).
 4 There is no indication in the record, however, that Operatec has filed a pass-through claim
 5 against CABGOC on behalf of Superior Energy under California law, and under the
 6 contractual relationships of the parties, Superior Energy lacks standing to make a demand
 7 for arbitration directly against CABGOC.

8 **4. Settlement Agreement and Supplement**

9 Superior Energy also contends that pursuant to the Settlement Agreement resolving
 10 the disputes arising out of the Subcontract, Operatec assigned to Superior Energy its
 11 “exclusive right to pursue any claims against CABGOC for non-payment of \$2,028,574, as
 12 reflected in the Ullswater Disputed Invoices.” Reply at 6. CABGOC counters that the
 13 language of the Settlement Agreement and the Supplement to Settlement does not
 14 effectively assign Operatec’s causes of action to Superior Energy.

15 **a. Settlement Agreement Does Not Assign Operatec’s Claims** 16 **Against CABGOC**

17 Superior Energy relies on the following provision of its Settlement Agreement with
 18 Operatec to demonstrate that Operatec assigned its causes of action under the Main
 19 Contract to Superior Energy:

20
 21 ***The Ullswater Claims.*** SES [Superior Energy Services, LLC] agrees
 22 to **release Operatec** and Ray from and against all claims, disputes
 23 and liabilities arising out of, relating to or in connection with those
 24 claims associated with SES invoices submitted to CABGOC in
 25 connection with the Ullswater Disputed Invoices; however, Operatec
 26 acknowledges that **SES reserves its rights as against CABGOC for**
 27 **payment of the Ullswater Disputed Invoices.** The scope of this
 28 release shall not inure to the benefit of CABGOC, and **SES reserves**
all rights to pursue payment from CABGOC and any other
 appropriate party not released hereby. Operatec acknowledges and
 affirms that it has not intended by any act or communication to
 acquiesce in or agree to CABGOC’s non-payment of the Ullswater
 Disputed Invoices and that Operatec has not released or agreed to
 waive payment by CABGOC of the Ullswater Disputed Invoices.
 Operatec acknowledges that it is neutral as to the merits or lack

thereof of the Ullswater Disputed Invoices. If SES proceeds at its own time and expense to seek payment through either negotiation or the filing of a claim, Operatec relinquishes any right it may have to collect its associated 9% management fees that would otherwise routinely be retained by Operatec. In the event SES succeeds in obtaining further payment of the Ullswater Disputed Invoices, and if such payment must be made through the Operatec account, then Operatec will cooperate and progress the payment of such further payments to Superior, consistent with Operatec's procedures under this Agreement and the Subcontract. As to the Ullswater Disputed Invoices, the release provided hereby to Operatec and Ray by this Agreement is absolute and effective regardless of whether or not SES receives payment of such invoices.

Settlement Agreement § 2.1(iv) (emphasis added). Though Superior Energy contends that Operatec assigned to Superior Energy the right to pursue causes of action against CABGOC to recover money damages for breach of the Main Contract, the language of the Settlement Agreement does not express any intent by Operatec to assign its claims against CABGOC.

This provision of the Settlement Agreement (1) "releases" Operatec from liability related to the Ullswater Disputed Invoices and (2) "reserves" Superior Energy's rights to collect against CABGOC, but contains no language assigning Operatec's claims against CABGOC to Superior Energy. The Settlement Agreement provides that Superior Energy "reserves all rights to pursue payment from CABGOC," but there is no assignment of Operatec's right to pursue payment from CABGOC. This provision only serves to reserve whatever rights that Superior Energy had in pursuing payment from CABGOC on the Ullwater Disputed Invoices. The language of the Settlement Agreement does not purport to transfer Operatec's right to seek money due under the Main Contract to Superior Energy. It is entirely plausible, and consistent with the language of the Settlement Agreement, that Operatec and Superior Energy intended to effect such an assignment, particularly in light of Superior Energy's release of claims against Operatec. But if this was the parties' intention, it was not manifested in the written instrument. Applying general principles of contract interpretation under California law, this provision of the Settlement Agreement is insufficient to create an assignment of the right to payment. "While no particular form of assignment is required, it is essential to the assignment of a right that the assignor manifests an intention

1 to transfer ‘the right.’” *Heritage Pac. Fin., LLC v. Monroy*, 215 Cal. App. 4th 972, 990
 2 (2013) (citing *Sunburst Bank v. Executive Life Ins. Co.*, 24 Cal. App. 4th 1156, 1164
 3 (1994)), *rev. denied* Jul. 31, 2013.

4 **b. Supplement to Settlement Agreement Does Not Assign**
 5 **Operatec’s Claim Against CABGOC for Unpaid Sums**

6 Superior Energy also relies on the Supplement to the Settlement Agreement as
 7 evidence of the assignment to Superior Energy of Operatec’s right to recover against
 8 CABGOC: “Sec. II(2.1)(iv) of the Settlement Agreement provides that SES [Superior
 9 Energy Services, LLC], and not Operatec, has the right to pursue any and all claims for
 10 recovery of any allegedly unpaid sums for the Work or Services supplied by [Superior
 11 Energy], as reflected in the Ullswater Disputed Invoices.” Even if this statement were
 12 intended to clarify the parties’ understanding that Operatec assigned its right to recover
 13 against CABGOC to Superior Energy, it is unclear whether Operatec relinquished its right
 14 to recover damages to Superior Energy, such that Superior Energy would “step into the
 15 shoes” of Operatec for purposes of recovering the unpaid money owed under the Main
 16 Contract. Mot. at 12 (citing *In re Boyajian*, 564 F.3d 1088, 1091 (9th Cir. 2009)
 17 (recognizing that “under general principles of assignment law an assignee steps into the
 18 shoes of the assignor”)). At most, this statement indicates the parties’ understanding that
 19 Superior Energy would pursue a claim against CABGOC for the disputed invoices, but not
 20 that Operatec transferred, assigned or relinquished its right to pursue the same claim
 21 against CABGOC. The Supplement to the Settlement Agreement does not sufficiently
 22 manifest an intent to assign Operatec’s right. See *Mission Valley E., Inc. v. Cnty. of Kern*,
 23 120 Cal. App. 3d 89, 96-97 (1981) (“Although the general rule in California is that choses in
 24 action or other personal rights to claim money are freely assignable, nonetheless, proof of
 25 the intent to assign must be ‘clear and positive’ to protect the obligor . . . from any further
 26 claim by the primary obligee”) (quoting *Cockerell v. Title Ins. & Trust Co.*, 42 Cal. 2d 284,
 27 292 (1954)).
 28

1 Because the Settlement Agreement and Supplement do not sufficiently manifest
2 Operatec's intent to assign to Superior Energy the right to claim money due or recover
3 money damages under the Ullswater Disputed Invoice, Superior Energy does not have
4 standing to compel arbitration to pursue that claim. To allow Superior Energy to proceed in
5 the absence of an effective assignment of that right would create the potential risk that
6 CABGOC would face claims from both Superior Energy and CABGOC. *See Henkel Corp.*
7 *v. Hartford Accident & Indem. Co.*, 29 Cal. 4th 934, 945 (2003) ("If both assignor and
8 assignee were to claim the right to defense, the insurer might effectively be forced to
9 undertake the burden of defending both parties.").

10 Despite the strong federal policy in favor of arbitration, Superior Energy has not met
11 its burden to prove an assignment of the right to recover damages under the Main Contract
12 which contained the arbitration provision. If Superior Energy had obtained a clearly worded
13 assignment from Operatec of its right to recover damages against CABGOC, Superior
14 Energy would likely be able to proceed to arbitration. Under California law, "[a]n
15 assignment for collection vests legal title in the assignee which is sufficient to enable him to
16 maintain an action in his own name, but the assignor retains the equitable interest in the
17 thing assigned." *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.*, 203 Cal.
18 App. 4th 1328, 1335 (2012) (quoting *Harrison v. Adams*, 20 Cal.2d 646, 650 (1942)). The
19 written settlement documents are consistent with an assignment but do not sufficiently
20 show an intent to assign Operatec's right of recovery to Superior Energy, and Superior
21 Energy has not even offered declarations to show that either Superior Energy or Operatec
22 intended such an assignment when it entered the Settlement Agreement with Superior
23 Energy.

24 **c. Non-Assignment Provision Does Not Necessarily Prohibit**
25 **Assignment of Claim for Money Due**

26 CABGOC argues that even if Operatec had assigned its rights under the Main
27 Contract to Superior Energy, such an assignment without CABGOC's prior consent is
28 prohibited by the Main Contract. Superior Energy does not appear to dispute this point, but

1 rather argues that Operatec expressly assigned its right to recover against CABGOC. See
2 Reply at 2 (“The claims belong to Superior Energy because Operatec expressly assigned
3 its **causes of action** against CABGOC (**not its contract rights** under the Main Contract)
4 to Superior Energy.”).

5 CABGOC does not dispute that under California law, a contractual provision that
6 restricts assignment of the contract does not generally prohibit “an assignment of claims.”
7 Opp. at 15. See *Henkel Corp. v. Hartford Accident & Indemnity Co.*, 29 Cal. 4th 934, 945
8 (2003) (a non-assignment clause does not preclude assignment “(1) when at the time of
9 the assignment the benefit has been reduced to a claim for money due or to become due,
10 or (2) when at the time of the assignment the insurer has breached a duty to the insured,
11 and the assignment is of a cause of action to recover damages for that breach”); *Benton v.*
12 *Hofmann Plastering Co.*, 207 Cal. App. 2d 61, 67 (Cal. Ct. App. 1962) (“There is a
13 distinction between an assignment of a contract and an assignment of the proceeds of the
14 contract.”) (citation omitted). CABGOC argues, however, that even if Operatec had
15 assigned its claims to Superior Energy, such assignment would not give Superior Energy
16 the right to arbitrate that assigned claim. Because the settlement documents cited by
17 Superior Energy do not manifest a “clear and positive” intent by Operatec to assign its right
18 to claim money due or recover damages against CABGOC, it is not necessary to reach the
19 question whether assignment of a claim for money due would be grounds to compel
20 arbitration of that claim.

21 Because Superior Energy has failed to show that Operatec assigned its rights under
22 the Main Contract, Superior Energy does not have standing to compel arbitration. The
23 petition for an order compelling arbitration is therefore DENIED. Superior Energy’s request,
24 in the alternative, for leave to file an amended petition is denied as futile on the ground that
25 Superior Energy lacks standing to bring a claim under the arbitration agreement. To the
26 extent that Superior Energy asks for leave to keep the case open to file a complaint, the
27 request is DENIED on the ground that this case is fully adjudicated and judgment will be
28 entered. If Superior Energy chooses to file a complaint, any complaint based on the

1 parties' rights under the Main Contract will likely raise similar standing concerns as the
2 issues raised in this petition to compel arbitration. The court has no opinion, however, as to
3 whether Superior Energy may bring a complaint on some other basis.

4 **C. Third Party Beneficiary**

5 Superior Energy contends that it may compel arbitration as a non-signatory because
6 it is a third-party beneficiary of the Main Contract, which contemplates that Operatec would
7 hire a subcontractor to complete the work. Superior Energy did not raise this point during
8 oral argument, but its briefs rely on authorities finding third party beneficiary status under
9 contracts outside the context of a construction project. CABGOC, by contrast, cites
10 contrary authority governing third party beneficiary status under construction agreements,
11 which is more directly applicable to this dispute.

12 **1. Legal Standard**

13 California Civil Code section 1559 provides, "A contract, made expressly for the
14 benefit of a third person, may be enforced by him at any time before the parties thereto
15 rescind it." The promise in such a situation is treated as having been made directly to the
16 third party. *Outdoor Services, Inc. v. Pabagold, Inc.*, 185 Cal. App. 3d 676, 681 (1986)
17 (citing *Shell v. Schmidt*, 126 Cal. App. 2d 279, 290 (1954)). It is not necessary that an
18 express beneficiary be specifically identified in the contract; he or she may enforce it if he
19 or she is a member of a class for whose benefit the contract was created. *Id.*

20 Under California law, a purported third-party beneficiary must show that the contract
21 was "made expressly for the benefit of a third person." Cal. Civ. Code § 1559; *Trustees of*
22 *Screen Actors Guild-Producers Pension and Health Plans v. NYCA, Inc.*, 572 F.3d 771,
23 779 (2009). California courts interpret the word "expressly" as the negative of "incidentally."
24 *Spinks v. Equity Residential Briarwood Apts.*, 171 Cal. App. 4th 1004 (2009). Thus, "it is
25 not enough that the third party would incidentally have benefited from performance. . . . The
26 contracting parties must have intended to confer a benefit on the third party." *Spinks*, 171
27 Cal. App. 4th at 1004 (citation and internal quotation marks omitted).

1 **2. Analysis**

2 Superior Energy relies primarily on the holding of *Outdoor Services* to assert that it is
3 an intended third party beneficiary of the Main Contract and therefore has standing to
4 enforce the arbitration agreement. However, the reasoning of *Outdoor Services* has not
5 been applied to the construction context. Under *Southern Cal. Acoustics Co. v. C.V.*
6 *Holder, Inc.*, 71 Cal. 2d 719 (1969), California law requires a stronger showing of intent to
7 benefit a subcontractor in the construction context to grant third party beneficiary status
8 under a construction agreement.

9 **a. Outdoor Services**

10 In *Outdoor Services*, the court of appeal recognized that a non-party to a contract
11 may enforce an arbitration agreement as a third party, creditor beneficiary if “the promisor’s
12 performance of the contract will discharge some form of legal duty owed to the beneficiary
13 by the promisee.” 185 Cal. App. 3d at 682. The contract at issue there was a
14 manufacturer’s contract with an advertising agency for an advertising campaign, whereby
15 the agency would make contracts with advertising media and others to effectuate the
16 manufacturer’s ad campaign, and the manufacturer agreed to pay the advertising agency
17 for its services. *Outdoor Servs.*, 185 Cal. App. 3d at 682. There, the court held that a
18 non-party owner of advertising space who had contracted with the advertising agency to
19 provide outdoor advertising space was a third party beneficiary of the manufacturer’s
20 promise to pay for services under the advertising contract. The court determined that the
21 manufacturer knew that the advertising agency would contract with third parties to
22 effectuate the advertising campaign. The court found that the manufacturer, as the
23 promisor, realized that it was assuming the advertising agency’s duty to pay for the fees for
24 goods and services that would be incurred to effectuate the advertising campaign. *Id.* at
25 683. Therefore, the third party owner of the outdoor advertising space was a third-party
26 beneficiary of the manufacturer’s promise to pay. *Id.* See also *Ronay Family Ltd. P’ship v.*
27 *Tweed*, 216 Cal. App. 4th 830, 837 (2013) (applying *Outdoor Services* to find third party
28

1 beneficiary standing to enforce an arbitration clause of an agreement between brokerage
2 firm and a customer to open an investment account).

3 Superior Energy argues that the Main Contract expressly contemplated the use and
4 payment of subcontractors to complete the work required under the Main Contract, and that
5 Superior Energy is an intended third party beneficiary under the reasoning of *Outdoor*
6 *Services*. Reply at 9. Superior Energy does not, however, cite authority applying the
7 holding of *Outdoor Services* to the construction or general contractor context to find that a
8 subcontractor is a third party beneficiary under a construction contract merely because the
9 contract contemplates that a subcontractor would be paid for work specified in the general
10 contract. In the construction context, as discussed below, California law requires a
11 showing of specific intent to benefit a subcontractor in order to find third party beneficiary
12 standing.

13 **b. California Law Governing Construction Contracts**

14 In opposition, CABGOC cites *Southern Cal. Acoustics Co. v. C.V. Holder, Inc.*, 71
15 Cal. 2d 719 (1969), in which the California Supreme Court held that a subcontractor cannot
16 recover directly from the public entity that owns a construction project as a third-party
17 beneficiary unless it was specifically intended to benefit from the issuance of the general
18 contract. There, the court found that the subcontractor was named in the general contract
19 for a school construction project because the listing of subcontractors was required by
20 statute, but not “because the contracting parties’ purpose was expressly to benefit it.” *Id.* at
21 727-28. The court held that the subcontractor “was at most an incidental beneficiary and
22 therefore cannot recover as a third-party beneficiary of the contract between [the general
23 contractor] and the school district.” *Id.* at 728.

24 The parties do not address the apparent inconsistency in the authorities that they
25 cite in the construction context and outside the construction context on the question of third
26 party beneficiary status. Because this dispute involves contracts to provide services for an
27 oil exploration project that is similar to projects in the construction industry, this case is
28 governed by the state supreme court’s holding in *Southern Cal. Acoustics* rather than

1 *Outdoor Services*, which was issued by a lower appellate court and does not apply to the
2 specific context of a construction agreement. If the reasoning of *Outdoor Services* were
3 applied to construction contracts, third party beneficiary status would be conferred on every
4 subcontractor that performed work governed by the general contract because a
5 construction contract typically contemplates that a subcontractor would be hired and paid to
6 do some or all of the work required under the general contract. In *Southern Cal. Acoustics*,
7 by contrast, the court required evidence that the general contractor and the public entity
8 intended to benefit the subcontractor, and held that the subcontractor was an incidental
9 beneficiary, even though the subcontractor was named in the contract by legal mandate.
10 Applying *Southern Cal. Acoustics* here, Superior Energy would have to show more than the
11 contemplation of hiring and paying a subcontractor as evidence of the parties' intent to
12 benefit the subcontractor in the Main Contract.

13 Superior Energy fails to demonstrate that the parties to the Main Contract intended
14 to benefit the subcontractors who performed work on the project. Under *Southern Cal.*
15 *Acoustics*, Superior Energy is "at most an incidental beneficiary," and cannot enforce the
16 arbitration agreement between Operatec and CABGOC.

17 **D. Equitable Estoppel**

18 Superior Energy contends that it may compel arbitration as a nonsignatory to the
19 arbitration agreement under the doctrine of equitable estoppel.

20 **1. Legal Standard**

21 "Equitable estoppel precludes a party from claiming the benefits of a contract while
22 simultaneously attempting to avoid the burdens that contract imposes." *Comer v. Micor,*
23 *Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (citation omitted). The Ninth Circuit has
24 recognized that in the arbitration context, the equitable estoppel doctrine has generated two
25 lines of cases. "Under the first of these lines, nonsignatories have been held to arbitration
26 clauses where the nonsignatory 'knowingly exploits the agreement containing the
27 arbitration clause despite having never signed the agreement.'" *Id.* (quoting *E.I. DuPont de*
28 *Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates*, 269 F.3d 187, 199 (3d Cir.

2001)). “Under the second line of cases, signatories have been required to arbitrate claims brought by nonsignatories ‘at the nonsignatory’s insistence because of the close relationship between the entities involved.’” *Id.* (quoting *DuPont*, 269 F.3d at 199).

2. The Doctrine of Equitable Estoppel Does Not Confer Standing to Compel Arbitration on a Nonsignatory Who Brings Claims Against a Signatory to an Arbitration Agreement

Superior Energy, as a nonsignatory, seeks enforcement of the arbitration agreement under the line of cases recognizing a nonsignatory’s right to compel arbitration. Superior Energy relies on authority recognizing that where a signatory to an arbitration agreement brings claims against a nonsignatory, the signatory is estopped from refusing to arbitrate its claims against the defendant nonsignatory where “the issues the [nonsignatory] is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.” Mot. at 13-14 (citing *In re Apple & AT&T Mobility Antitrust Litig.*, 826 F. Supp. 2d 1168, 1176 (N.D. Cal. 2011) (granting defendants’ motions to compel arbitration) (citing *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004) (internal quotation marks omitted), petition for permission to appeal denied *sub nom. Holman v. Apple, Inc.*, No. 12-80012 (9th Cir. Apr. 27, 2012)). *In re Apple* presented a situation where a nonsignatory defendant sought arbitration of the claims against it brought by a signatory to an arbitration agreement. In that situation, the Ninth Circuit has recognized that a nonsignatory may compel a signatory to arbitrate the signatory’s claims based on estoppel if two requirements are met: (1) “the subject matter of the dispute was intertwined with the contract providing for arbitration,” and (2) there exists “a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement.” *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1046 (9th Cir. 2009) (affirming denial of motion to compel arbitration) (citing *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 359, 361 (2d Cir. 2008)).

1 Unlike *In re Apple* and *Mundi*, where the nonsignatory sought to compel arbitration
2 of a signatory's claims against it, Superior Energy, a nonsignatory, seeks arbitration of its
3 own claims against a signatory. The principles of equitable estoppel that preclude a
4 signatory from avoiding arbitration of the **signatory's claims against a nonsignatory** do
5 not work to the advantage of a nonsignatory that lacks standing to compel arbitration of the
6 **nonsignatory's claims against a signatory**. In *DuPont*, the Second Circuit recognized
7 that where a nonsignatory parent company seeks to compel arbitration of its claims against
8 a signatory pursuant to an arbitration agreement signed by a subsidiary of the nonsignatory
9 parent company, the signatory would be bound to arbitration because "[i]n essence, [the]
10 nonsignatory voluntarily pierces its own veil to arbitrate claims against a signatory that are
11 derivative of its corporate subsidiary's claims against the same signatory." *DuPont*, 269
12 F.3d at 201 (citations omitted)]. Under this reasoning, a parent corporation may pierce its
13 own corporate veil to arbitrate its claims under an arbitration agreement entered by a
14 subsidiary, but Superior Energy cannot assert this basis for equitable estoppel because it
15 does not have a parent-subsidiary relationship with any signatory to the Main Contract.

16 Superior Energy cites no authority recognizing a nonsignatory's right to compel
17 arbitration of its own claims against a signatory to an arbitration agreement under an
18 equitable estoppel theory. Notwithstanding Superior Energy's compelling argument that
19 CABGOC should not be permitted to rely on artfully drafted contracts in a "gotcha" scheme
20 to avoid liability for services rendered, if the equitable estoppel exception to the standing
21 requirement were applied as Superior Energy proposes, the exception would swallow the
22 rule. Superior Energy lacks any equitable estoppel ground to compel arbitration.

23 **E. Incorporation by Reference**

24 Superior Energy contends that it is entitled to compel arbitration against CABGOC
25 because the Subcontract expressly incorporates all the terms and conditions of the Main
26 Contract. Mot. at 16. Superior Energy fails to demonstrate, however, that it has a
27 contractual relationship with CABGOC that would entitle it to arbitrate with CABGOC.
28

1 Superior Energy cites *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773,
2 776 (2d Cir. 1995), in support of its argument that CABGOC should be compelled to
3 arbitrate Superior Energy's claims. In *Thomson*, the Second Circuit recognized
4 incorporation by reference as grounds for binding nonsignatories to arbitration agreements
5 where the nonsignatory has a separate contractual agreement that incorporates the
6 arbitration clause. See also *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006)
7 (recognizing that a nonsignatory may be bound by an agreement to arbitrate under ordinary
8 contract and agency principles, including incorporation by reference). In *Thomson*, a
9 signatory to an arbitration agreement moved to compel arbitration against a nonsignatory
10 parent corporation, Thomson. The court of appeals held that the party seeking arbitration
11 did not show that the arbitration agreement was incorporated into any document which the
12 nonsignatory adopted. Thus, the court of appeals held that the nonsignatory could not be
13 bound under an incorporation theory. *Thomson*, 64 F.3d at 777.

14 *Thomson* held that an arbitration agreement could not be enforced **against** a
15 nonsignatory, and is not directly applicable here, where Superior Energy, as a
16 nonsignatory, seeks to enforce an arbitration agreement against a signatory. See *CD*
17 *Partners, LLC v. Grizzle*, 424 F.3d 795, 799 (8th Cir. 2005) ("The test for determining
18 whether a nonsignatory can force a signatory into arbitration is different from the test for
19 determining whether a signatory can force a nonsignatory into arbitration."). Where a
20 nonsignatory attempts to enforce an arbitration agreement, the court of appeals in
21 *Thomson* recognized that "a nonsignatory may compel arbitration against a party to an
22 arbitration agreement **when that party has entered into a separate contractual**
23 **relationship with the nonsignatory incorporating the existing arbitration clause.**"
24 *Thomson*, 64 F.3d at 777 (emphasis added).

25 Here, Superior Energy has not demonstrated that it entered a separate agreement
26 with CABGOC incorporating the arbitration provision of the Main Contract. In reply,
27 Superior Energy fails to address CABGOC's argument that *Thomson* requires that the
28 nonsignatory may compel arbitration against a party to an arbitration agreement if they


1 have entered a separate contract that incorporates the arbitration provision. The petition to
2 compel arbitration under an incorporation by reference theory therefore lacks merit.

3 **CONCLUSION**

4 In accordance with the foregoing, Superior Energy's first amended petition to compel
5 arbitration is DENIED. This order terminates the case and all pending motions. The clerk
6 shall close the file.

7 **IT IS SO ORDERED.**

8
9 Dated: December 6, 2013

10 
11 _____
12 PHYLLIS J. HAMILTON
13 United States District Judge
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28